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No. 08-1182

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILMINGTON HOSPITALITY, LLC,
Petitioner,

v.

NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

REPLY BRIEF

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Pursuant to Rule 15.6 of the rules of this Court, Petitioner Wilmington Hospitality, LLC ("WH") submits this Reply Brief in support of its Petition for a Writ of Certiorari ("Petition") to address a new point raised in the Brief in Opposition of Respondent, New Castle County ("County").

I. THE ISSUE OF WHETHER THE OWNERSHIP BAN IMPOSED BY THE COUNTY SUPPORTS A CLAIM FOR INVERSE CONDEMNATION WAS EXPRESSLY RAISED BEFORE BOTH THE DELAWARE SUPERIOR COURT AND THE DELAWARE SUPREME COURT.

WH's third argument in support of the Petition is that the Delaware Supreme Court erred by affirming

the Delaware Superior Court's denial of WH's Motion to Amend the Complaint to allege a regulatory taking. Specifically, the courts below erred by concluding that WH could not state a claim for inverse condemnation despite allegations that the County prohibited WH, its principals, and anyone related to them from owning the property for twenty years ("ownership ban"). Petition at 31-34. In its Brief in Opposition, in response to WH's third argument, the County states, "WH is seeking to raise a new argument in this Court, not considered with respect to the subject Motion to Amend by the trial court or by the Delaware Supreme Court." Opp. Brief at 12. While it is true that neither the Delaware Superior Court's May 24, 2005 Memorandum Opinion nor the Delaware Supreme Court's December 22, 2008 Opinion specifically mentions WH's argument that the County's ownership ban constituted a regulatory taking, it is entirely inaccurate to state that this is a "new argument" that was not considered by the courts below.

In briefing on the Motion to Amend, the County argued that "WH never had a compensable property interest in a non-conforming 155,480 square foot hotel." County's Opposition to Motion to Amend Complaint, Superior Ct. Docket Item ("D.I.") 41, at 6. In response, WH asserted that the County's position "turn[ed] a blind eye to WH's rights as a landowner, including ... the right of WH and its principals to transfer or devise the property to others." WH's Reply in Support of Motion to Amend Complaint, Superior Ct. D.I. 43, at 3. During the February 23, 2005 hearing on the Motion to Amend, WH's counsel argued as follows:

Now, the first specific issue that was raised by the defense is whether or not the plaintiff has adequately alleged a property interest. What we know from the case law is that property interests can be both tangible and intangible property. That was emphasized in Ruckelshaus v. Monsanto Supreme Court decision, which, again, was cited in our papers.

And what the Court emphasized there, in referring back to the General Motors case, another Supreme Court decision, is that property is not simply the land itself. It's not simply the building. It's the rights of the citizen that inure in relation to that property.

And what are some of those rights? The right to use and enjoy that property. The right to pass on property to one's descendants. And that was emphasized in the Hodel v. Irving decision, another U.S. Supreme Court decision.

. . . .

So there are a panoply of property interests that are protected, not simply the right to the land or the right to the building, when we look at what are protectable property interests.

In looking at the partial taking inquiry, what we learned from the Monsanto case as well as the Hodel case is that one factor alone, proof of one of the three factors, can be enough. . . . In Hodel, the Court focused on the extraordinary nature of the action. Justice O'Connor spoke about the interference with one's right to pass on one's own property is such an extraordinary measure that that alone could indicate a taking.

> THE COURT: Are you defining the extraordinary interference in this case as the restriction of the participation of other family members for 20 years?
>
> MR. YANNACONE: I think that's one of them, yes. I think that's one of the extraordinary factors in this case, the fact that they had a restriction that said these family members could not inherit or get the property under any circumstances. We're also saying that the forfeiture of this interest as a condition of using the property is also extraordinary.

Transcript, Superior Ct. D.I. 151, at p.4, l.13 to p. 6, l.19. The County's response during oral argument was that the ownership ban was a "suggestion" not a "regulation." *Id.* at p. 22, ll. 4-11. In its May 24, 2005 Memorandum Opinion denying WH's Motion to Amend the Complaint, the Delaware Superior Court concluded that the only property interest WH conceivably had at stake was "a property interest in a hotel not to exceed 118,805 square feet" (App. at 26a), thereby rejecting WH's position that its property interests included the rights to freely devise and transfer the property.

In support of its cross-appeal to the Delaware Supreme Court of the trial court's May 24 decision, WH argued that the trial court mistakenly focused solely on whether WH had any compensable property interest in the square footage in excess of 118,805 square feet and overlooked WH's constitutionally protected rights to freely transfer or devise its property. WH's Ans. Brief/Opening Brief, Del. Supreme Ct. D.I. 21, at 46-47. In response, the County cited no legal authority for the proposition that interfering with the right to transfer property does not constitute a taking

but, rather, asserted as a factual matter that nothing prevented WH from transferring the property to someone else. County's Reply Brief/Ans. Brief, Del. Supreme Ct. D.I. 22, at 31 n. 73. As WH pointed out in its reply brief in the Delaware Supreme Court, the County's factual assertion contradicted the allegations of the amended complaint (specifically, ¶¶39 and 43, App. at 176a, 177a), which the trial court was required to accept as true for purposes of the Motion to Amend. WH's Reply Brief, Del. Supreme Ct. D.I. 23, at 9. Tellingly, the County never took the position before the Delaware Supreme Court that WH's argument raised a new issue not considered by the Delaware Superior Court. That is because the issue was put squarely before the trial court, both in briefing and oral argument. Thus, the County's position that WH is arguing for the first time before this Court that the ownership ban constituted a regulatory taking is wholly negated by the record below.

Respectfully submitted,

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